

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FILED/ACCEPTED

JAN - 9 2007

Federal Communications Commission
Office of the Secretary

In the Matter of)
Request for Review by)
Waterway Communication System, LLC)
and)
Mobex Network Services, LLC)
of Decision of Universal Service Administrator)

FCC File No.
CC Docket No. 96-45

To: Marlene H. Dortch, Secretary
Attention: Chief, Wireline Competition Bureau

REQUEST FOR REVIEW

Maritime Communications/Land Mobile, LLC (MC/LM), by its attorney, hereby respectfully requests that the Commission review the action of the Universal Service Administrator (USAC) denying the demand of Waterway Communications System, LLC (Filer ID 808786, hereinafter, "Watercom") and Mobex Network Services, LLC (Filer ID 822896, hereinafter, "Mobex") (collectively, the "Payors", for refund of contributions to the Universal Service Fund (USF) made by the Payors. In support of its position, MC/LM shows the following.

Statement of Interest: The Payors provided Automated Maritime Telecommunications System service. Payors made contributions to the USF during the period 2001-2006 in the amount of \$1,301,230.00 and requested that USAC refund all contributions which they had made. MC/LM now holds the Automated Maritime Land Mobile System authorizations which had been held by the Payors and, for purposes of this proceeding is the successor in interest of Payors.

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ORIGINAL

Statement of Facts: The Payors were authorized by the Commission to provide Automated Maritime Telecommunications System (AMTS) service, a Maritime Service regulated under Part 80 of the Commission's Rules. Between 2001 and 2006, the Payors made contributions to the Universal Service Fund in the amount of \$1,301,230.00. On May 8, 2006, the Payors demanded refund of those monies from USAC. The Payors provided USAC with documentation demonstrating that they had paid to USAC the amount of money which they demanded be refunded. The Payors claimed that these contributions were not required by the FCC Rules and that Payors were improperly invoiced by USAC and thereby forced to pay contributions which were not required to be paid under the FCC Rules for the Universal Service contribution program. In a letter dated November 15, 2006 (copy attached hereto), USAC denied the Payors' claim.

Question Presented for Review: Were the Payors exempt from any duty to contribute to the USF?

Statement of Relief Sought: The Payors request that the Commission order USAC to refund \$1,301,230.00.

DISCUSSION

Towboat and Barge Operators are the Epitome of "Significantly Restricted Classes" of Users

At paragraph 786 of its Report and Order in CC Docket No. 96-45, 12 FCC Rcd 8776 (1997), the Commission determined not to impose Universal Service Fund contribution obligations on certain providers of telecommunications service. The Commission stated that it "agree[d] with

the Joint Board's recommendation that any entity that provides interstate telecommunications to users other than significantly restricted classes for a fee should contribute to the support mechanisms," 12 FCC Rcd at 9178. At footnote 2013 on page 9178, the Commission referred to its determination of those entities which provide service to significantly restricted classes of users.

At footnote 2013, the Commission referred to its Second Report and Order in Implementation of Sections 3(n) and 332 of the Communications Act, 9 FCC Rcd 1411, 1439 (1994) (the CMRS 2d R&O). At paragraph 67 of the CMRS 2d R&O, the Commission explained that in applying the statutory language, it looked to several relevant factors, such as the type, nature and scope of users for whom a service is intended. The Commission explained specifically that

in the case of existing eligibility classifications under our Rules, service is not "effectively available to a substantial portion of the public" if it is provided exclusively for internal use or is offered only to a significantly restricted class of eligible users, as in the following services: (1) Public Safety Radio Services; (2) Special Emergency Radio Service; (3) Industrial Radio Services (except for Section 90.75, Business Radio Service); (4) Land Transportation Radio Services; (5) Radiolocation Services; (6) Maritime Service Stations; and (7) Aviation Service Stations,

id. Omitted footnotes after each Radio Service refer to specific Rule Sections. The footnote for Maritime Service Stations referred to 47 C.F.R. §80.15, which includes all Maritime Service Stations, including Public Coast stations of which Automated Maritime Telecommunication System stations are a species.

There are two broad categories of entities which are required to contribute to the USF, namely, mandatory contributors and permissive contributors. The Commission determined that certain entities are in the category of mandatory contributor, see, 12 FCC Rcd 8776, 9170, para. 775; and that certain other entities are in the category of permissive contributor, see, *id.* at 9182,

para. 793.

The Commission explained that Section 254(d) of the Communications Act of 1934, as amended (the Act), 47 U.S.C. §254(d),

mandates that "every telecommunications carrier that provides interstate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, to the specific, predictable, and sufficient mechanisms established by the Commission to preserve and advance universal service." The statute defines the term "telecommunications carrier" as "any provider of telecommunications services," and the term "telecommunications service" as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used,"

12 FCC Rcd 8776, 9171 (1997) (First Universal Service Order).

Section 332(d)(1) of the Act defines "commercial mobile radio service" (CMRS) as "any mobile service (as defined in section 3) that is provided for profit and makes interconnected service available to (A) the public or (B) to such classes of eligible users as to be effectively available to a substantial portion of the public," 47 U.S.C. §332(d).

Argument

The Payors are neither in the class of mandatory contributor nor in the class of permissive contributor because they did not provide service to the public or to such a class of eligible user as to be effectively available to a substantial portion of the public. The class of eligible users to which AMTS service can be provided is significantly restricted. Towboat and barge operators are not the general public, nor are they a substantial portion of the public. It takes millions of dollars and specific pilot authorizations to obtain and pilot a towboat or to own and operate a barge on the nation's inland waterways. MC/LM can think of no better example of a restricted class of user than American Commercial Barge Line, LLC, which was the Payors' largest

customer and which operated towboats under rigorous practical and regulatory requirements far beyond the scope which the general public must meet. To win acceptance of their AMTS service, it was necessary for the Payors to design and have manufactured a special ship station end user unit which could withstand harsh marine conditions, including constant moisture and exposure to corrosive salt water in coastal areas, and which was rugged enough not to be disabled by the intense vibration from the towboats large marine engines. The 220 MHz duplexer components, alone, were so large and heavy that they made the ship station unit impractical for use by the general public. The AMTS service was limited in scope, therefore, to a handful of eligible entities as it related to their operation of large vessels in the constantly changing rivers of the Mississippi, Illinois, Ohio and other river systems. Nothing about AMTS changed between the time of the CMRS 2d R&O and the time of the First Universal Service Order. Nothing in the First Universal Service Order overruled, reversed, or altered in any way the Commission's determination that Maritime Service "is offered only to a significantly restricted class of eligible users," CMRS 2d R&O.

There are many and varied bases for the Commission's determination that AMTS systems are not required to contribute to the USF. At the times that the Payors obtained their AMTS licenses, the Commission's Rules narrowly limited the geographic areas within which service could be provided. Section 80.475(a) of the Commission's Rules required that

AMTS applicants proposing to serve inland waterways must show how the proposed system will provide continuity of service to along more than 60% of each one or more navigable inland waterways. Inland waterways of less than 240 kilometers (150 miles) must be served in their entirety. AMTS applicants proposing to serve portions of the

Atlantic, Pacific, or Gulf of Mexico coastline must define a substantial area and show how the proposed system will provide continuity of service for it, 47 C.F.R. §80.475(a) (2001).¹

In many instances, the Commission has refused to permit an AMTS applicant to obtain an authorization for service because the proposed service area did not meet the Commission's narrow requirements. Those actions significantly restricted the class of eligible user.

In Fred Daniel d/b/a Orion Telecom (Orion), the Commission determined that not only could an AMTS system not be authorized for coverage over only land but that many eligible persons in communities, including Denver, Colorado; Henderson, Nevada; Yuma, Phoenix, and Tucson, Arizona; and El Paso, Ft. Worth, and Dallas, Texas could not obtain AMTS service because only one coast station would have been required for each community, 14 FCC Rcd 19912 (1999). The Commission also indicated in Orion that its original intent in allocating spectrum to AMTS was to allow a system to serve only the Mississippi River and the Gulf Intracoastal Waterway. In Warren Havens, 16 FCC Rcd 2539 (WTB 2001), the Commission's restrictive Rules prevented an AMTS applicant from providing AMTS service to eligible persons in Dallas, Austin, and San Antonio, Texas.

Not only did the Commission's Rules during the relevant timeframe restrict service to certain maritime areas, the Rules further limited AMTS coast stations to sites at which interference will not be caused to Television stations on certain channels, 47 C.F.R. §80.475(a)(1) (2001). To protect a TV station, the Commission refused to permit the location of an AMTS coast station in Atlanta, among other areas, Regionet Wireless License, LLC, 16 FCC Rcd 2534

¹ The Commission has granted licenses for AMTS service on a geographic area basis but the Payors did not hold such authorizations.

(WTB 2001), thereby restricting the class of eligible end users.

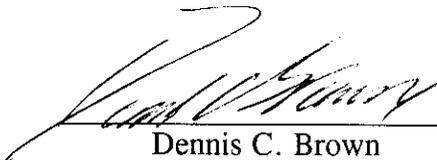
The Commission's Rules significantly restricted the class of eligible end users on land. Section 80.123(b) of the Rules provided that an AMTS system "must afford priority to marine-originating communications," 47 C.F.R. §80.123(b), thereby limiting the class of land users who could be served to those were able and willing to accept a second, lower priority of service. The Commission further restricted the class of eligible end users by requiring that "land stations may communicate only with public coast stations," 47 C.F.R. §80.123(f). Consequently, AMTS systems are restricted from providing service to eligible users which require communications between mobile units, rather than communication with or through a coast station.

The Commission's Rules limited an AMTS system to providing service to only a significantly restricted class of eligible end users. These restrictions precluded an AMTS system from providing service to a substantial portion of the public. Accordingly, AMTS systems were excluded from any requirement to contribute to USF.

CONCLUSION

For all the foregoing reasons, the Payors were exempt from any duty to contribute to the USF. The Commission should order USAC to refund to MC/LM the sum of \$1,301,230.00.

Respectfully submitted,
MARITIME COMMUNICATIONS/
LAND MOBILE, LLC



Dennis C. Brown

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703/365-9436

Dated: January 9, 2007



Universal Service Administrative Company

CONTAINS CONFIDENTIAL INFORMATION
Administrator's Decision

November 15, 2006

VIA CERTIFIED MAIL

Dennis C. Brown
Attorney at Law
8124 Cooke Court, Suite 201
Manassas, VA 20109

Re: Waterway Communications System, LLC (Filer ID 808786) and Mobex Network Services, LLC (Filer ID 822896)

Dear Mr. Brown:

The Universal Service Administrative Company ("USAC") has completed an evaluation of the demand for refund submitted by you, dated May 8, 2006, on behalf of Waterway Communications System, LLC ("Watercom") and Mobex Network Services, LLC ("Mobex"). USAC also reviewed the supplemental information provided by John Readron, President, MCM LLC, on August 14, 2006 in response to USAC's request of June 30, 2006. In the May 8, 2006 letter, you requested that USAC refund payments made by Watercom and/or Mobex (collectively, "Mobex") to USAC for contributions to the Universal Service Fund (USF) in the amount of \$1,301,230.00.

With regard to the requested refund, as further explained below, USAC does not agree that Federal Communications Commission (FCC or Commission) rules and regulations support the request.

Summary and Background

On March 20, 2001, Watercom sent a letter to USAC regarding the sale of Watercom from American Commercial Lines to Mobex Network Services, LLC. Watercom's Filer ID (808786) continued to be the Filer ID under which FCC Form 499 filings were submitted by the entity. USAC continued to bill Watercom's Filer ID for USF contributions based on the revenue reported on the FCC Form 499s filed by Watercom under the new Mobex management. On June 17, 2003, in response to USAC outreach

regarding missing FCC Form 499s, Mobex notified USAC that Watercom and Regionet Wireless Operations, LLC (Filer ID 818032) should be consolidated into a single Filer ID for Mobex. USAC processed this request, creating new Filer ID 822896 for the consolidated entity. Watercom was billed through June 2003 at which point, any further billings were applied to the consolidated 822896 Mobex Filer ID. Mobex was billed by USAC beginning in July 2003 through September 2005. FCC Form 499-Q worksheets submitted by Mobex since that time have resulted in a *de minimis* status (annual contributions expected to be less than \$10,000), for which no billings have been generated.¹ However, in the absence of a filed August 2006 FCC Form 499-Q, USAC generated an estimate equal to one-fourth of the revenue reported on the company's 2006 FCC Form 499-A, which resulted in a non-*de minimis* status for the company. Billings are being applied in October, November and December 2006.

USAC records show no point at which annual revenue was estimated in lieu of an actual FCC Form 499 filing by Mobex/Watercom. There have been four occasions upon which quarterly revenue was estimated by USAC, due to the company's failure to file, using information from Mobex's previously filed FCC Form 499-A. Because estimates are based on the company's actual Form 499-A filings, all USF assessments have been billed to Mobex/Watercom using officer-certified data provided by the company.

On May 8, 2006, USAC received the refund demand letter referenced above for the periods 2001-2004. In that letter, you allege the CMRS services provided by Watercom and Mobex for this period were exempt from USF contribution obligations because the FCC specifically exempted CMRS providers in the *First Universal Service Order*.² USAC responded on June 30, 2006, requesting additional information and support regarding the services provided by Mobex, which Mobex provided on August 14, 2006.

Analysis and Discussion

Mobex's Claim Is Not Supported by FCC Rules and Regulations

Mobex's claim that neither it nor Watercom, as successive providers of maritime radio service, are or have ever been liable for contributions to the federal Universal Service Fund is not supported by FCC rules and regulations.

¹ See 47 C.F.R. § 54.708 ("If a contributor's contribution to universal service in any given year is less than \$10,000 that contributor will not be required to submit a contribution or Telecommunications Reporting Worksheet for that year....")

² *Federal-State Joint Board on Universal Service, Report and Order*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776 (1997) (*First Universal Service Order*).

In support of its claim Mobex argues the Commission, in the *First Universal Service Order*:

agree[d] with the Joint Board's recommendation that any entity that provides interstate telecommunications to users other than significantly restricted classes [of users][fn] for a fee should contribute to the support mechanisms.

[fn] The *CMRS 2nd R&O* stated that significantly restricted classes included, for example, maritime use only and public safety use only. *Implementation of Sections 3(n) and 332 of the Communications Act*, Second Report and Order, FCC 94-31, 9 FCC Rcd 1411, 1439 (1994) (*CMRS 2nd R&O*). See *infra* section XIII.C.³

Mobex/Watercom then refers to the *CMRS 2nd R&O* citation, which provides in relevant part:

[I]n the case of existing eligibility classifications under our Rules, service is not “effectively available to a substantial portion of the public” if it is provided exclusively for internal use or is offered only to a significantly restricted class of eligible users, as in the following services: (1) Public Safety Radio Services; (2) Special Emergency Radio Service; (3) Industrial Radio Services . . . (6) *Maritime Service Stations*; and (7) Aviation Service Stations. Service among these Part 90 eligibility groups, or to internal users, is made available on only a limited basis to insubstantial portions of the public. We conclude that it was Congress’s intent that making service available to, or among, the eligible users in the above-stated private mobile radio services does not constitute service that is “effectively available to a substantial portion of the public.”⁴

Mobex/Watercom takes the language cited above to stand for the proposition that, as a provider of services that are not “effectively available to a substantial portion of the public,” maritime radio service providers such as Mobex/Watercom are not subject to a USF contribution obligations. However, the *First Universal Service Order* citation provided by Mobex/Watercom stands only for the proposition that providers of interstate telecom *other than to significantly restricted classes, i.e., common carriers, “should”* contribute to the USF.⁵ The cited language says nothing about the obligations of providers of interstate telecom to restricted classes. And, while the further citation by Mobex/Watercom appears to establish maritime radio service is *not* “effectively available to a substantial portion of the public,” this does not answer the question of whether maritime radio service is exempt from the USF contribution obligations.

³ *First Universal Service Order*, 12 FCC Rcd at 9178, ¶ 786 *First Universal Service Order*.

⁴ *CMRS 2nd R&O*, 9 FCC Rcd 1411, 1439, ¶ 67 (footnotes omitted; emphasis added).

⁵ See *supra* n.3.

Closer examination of the *First Universal Service Order* reveals the language cited by Mobex/Watercom is taken out of context. In full, the cited language reads:

In light of the legislative history and precedent discussed above, we conclude that *only common carriers should be considered mandatory contributors* to the support mechanisms. We agree with the Joint Board's recommendation that any entity that provides interstate telecommunications to users other than significantly restricted classes for a fee should contribute to the support mechanisms. . . .⁶

This language represents the Commission's agreement with the Joint Board's recommendation, pursuant to the 1996 Telecommunications Act's (the *1996 Act*) provisions governing universal service contributions, that common carriers must be considered mandatory contributors.⁷ Section 254(d) of the *1996 Act* specifically provides (emphasis added):

Every telecommunications carrier that provides interstate telecommunications services *shall contribute*, on an equitable and nondiscriminatory basis, to the specific, predictable, and sufficient mechanisms established by the Commission to preserve and advance universal service. . . . Any other provider of interstate telecommunications *may be required to contribute* to the preservation and advancement of universal service if the public interest so requires.⁸

Congress thus provided that interstate telecom "carriers" (i.e., common carriers) *shall* contribute to the USF. Congress then gave the Commission discretion to require "any other provider of interstate telecommunications" to contribute to the USF "if the public interest so requires."⁹ In implementing this language, the first question the Commission addressed was who must ("shall") contribute to the fund and the answer was common carriers. The Commission's discussion of this question is the language cited by Mobex/Watercom. Indeed this language appears under the section of the *First Universal Service Order* entitled "**B. Mandatory Contributors to the [USF] Support Mechanisms.**"¹⁰

In a subsequent section of the *First Universal Service Order* entitled "**C. Other Providers of Interstate Telecommunications,**" the Commission engages in a public interest analysis to support the Commission's determination of who, other than common carriers, should contribute to the USF.¹¹

⁶ *Id.*

⁷ The Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat 56 (*1996 Act*), amended the Communications Act of 1934.

⁸ *Id.*

⁹ *Id.*

¹⁰ *First Universal Service Order*, 12 FCC Rcd at 9170, ¶ 775.

¹¹ *First Universal Service Order*, 12 FCC Rcd at 9181, ¶ 793.

Before addressing this point, however, the Commission, in determining who else should contribute to the USF, explained it was “requir[ing] all the entities identified by the Joint Board in its Recommended Decision to contribute to the support mechanisms, subject to the slight modification discussed above regarding carriers that provide only international services.”¹² Thus, we can simply look at the Joint Board’s recommendation to determine its intent. The Joint Board specifically addressed arguments put forth by commenters that CMRS providers (which would include maritime radio service providers such as Mobex) should be exempt from a contribution obligation. In declining to recommend such an exemption, the Joint Board explained:

We recommend that [the definition of] “interstate telecommunications” [be construed broadly for purposes of identifying mandatory contributors and] include, but [not be] limited to, the interstate portion of the following:
cellular telephone and paging, *mobile radio* [i.e., CMRS], operator services, PCS, access (including SLCs), alternative access and special access, packet switched, WATS, toll-free, 900, MTS, private line, telex, telegraph, video, satellite, international/foreign, intraLATA, and resale services.¹³

The Joint Board went on to explicitly recommend:

We find no reason to exempt from contribution *CMRS*, satellite operators, resellers, paging companies, utility companies or carriers that serve rural or high cost areas that provide interstate telecommunications services, because the 1996 Act requires “every telecommunications carrier that provides interstate telecommunications services” to contribute to support mechanisms. Thus, to the extent that these entities are considered “telecommunications carriers” providing “interstate telecommunications services,” they must contribute to universal service support mechanisms.¹⁴

The Commission’s statement “requir[ing] all the entities identified by the Joint Board in its Recommended Decision to contribute [to the USF]” includes CMRS carriers such as maritime radio services. The only thing the Commission did differently was determine that such providers were not “mandatory” contributors but rather required an exercise of the Commission’s “permissive” authority supported by a public interest analysis. As the Commission explained:

. . . . Therefore, we find that the public interest requires . . . private service providers that offer interstate telecommunications to others for a fee . . . to

¹² *First Universal Service Order*, 12 FCC Rcd at 9181, ¶ 794.

¹³ Joint Board Recommended Decision, ¶¶ 783-85 (emphasis added).

¹⁴ Joint Board Recommended Decision, ¶ 787.

contribute to the preservation and advancement of universal service in the same manner as carriers that provide “interstate telecommunications services” because this approach reduces the possibility that carriers with universal service obligations will compete directly with carriers without such obligations. In addition, the inclusion of such providers as contributors to the support mechanisms will broaden the funding base, lessening contribution requirements on telecommunications carriers or any particular class of telecommunications providers.

Although some private service providers serve only their own internal needs, some provide services or lease excess capacity on a private contractual basis. The provision of services or the lease of excess capacity on a private contractual basis alone does not render these private service providers common carriers and thus mandatory contributors. We find justification, however, pursuant to our permissive authority, for requiring these providers that provide telecommunications to others in addition to serving their internal needs to contribute to federal universal service on the same basis as telecommunications carriers. Without the benefit of access to the PSTN, which is supported by universal service mechanisms, these providers would be unable to sell their services to others for a fee. Accordingly, these providers, like telecommunications or common carriers, have built their businesses or a part of their businesses on access to the PSTN; provide telecommunications in competition with common carriers, and their non-common carrier status results solely from the manner in which they have chosen to structure their operations. Even if a private network operator is not connected to the PSTN, if it provides telecommunications, it competes with common carriers, and the principle of competitive neutrality dictates that we should secure contributions from it as well as its competitors. Thus, pursuant to our permissive authority, we find that the public interest requires private service providers that offer services to others for a fee on a non-common carrier basis to contribute to the support mechanisms. . . .¹⁵

Lastly, the Commission in the *First Universal Service Order* did create some explicit exemptions. These include “self providers” such as companies that self provision telecom, government entities that purchase services in bulk for themselves, and, significantly, public safety and local governmental entities—e.g., CMRS providers such as police, medical, fire, and rescue dispatch services covered under Part 90 of the Commission rules.¹⁶ Maritime CMRS is provided under Part 80 of the Commission rules, and therefore, is not part of this public safety CMRS exemption. Thus, where the Commission established USF exemptions, they were explicit and did not include Maritime Radio Service.

¹⁵ *First Universal Service Order*, ¶¶ 795-96.

¹⁶ *First Universal Service Order*, ¶ 800.

Mobex/Watercom's entire argument is it offers a service--maritime radio service--that is not available to the public (i.e., Mobex/Watercom is a "private service provider"). The language above shows, however, that merely providing interstate telecommunications requires a company to contribute to the USF. It is not dependent on whether that company provides telecommunications on a private contractual basis or as a service to the public.

In conclusion, the language cited by Mobex/Watercom does not support its claim that, as an exclusive provider of maritime radio service -- a private, non-common carrier CMRS service -- Mobex/Watercom is exempt from the USF contribution obligation.

For the foregoing reasons, USAC hereby denies Mobex's request for a refund in the amount of \$1,301,230.00 for the periods 2001-2004.

This letter serves as the decision of the USF Administrator. Should Mobex wish to seek further relief, it may wish to file an appeal with the FCC. Information regarding waivers and appeals may be found in the FCC rules¹⁷ and at: <http://www.universalservice.org/fund-administration/contributors/file-appeal/>.

Sincerely,

/s/ WB Erwin, Vice President of Finance

Universal Service Administrative Company

Enclosure

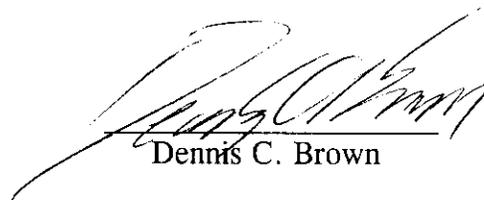
cc: Greg Reardon, President, MCLM, LLC
Regina Dorsey, FCC Office of Managing Director
Hillary DeNigro, FCC Enforcement Bureau
Greg Guice, FCC Wireline Competition Bureau
Trent Harkrader, FCC Enforcement Bureau

¹⁷ 47 C.F.R. §§ 54.719-725.

Certificate of Service

I hereby certify that on this ninth day of January, 2007, I served a copy of the foregoing Request for Review on the following person by placing a copy in the United States Mail, first-class postage prepaid:

W.B. Erwin, Director of Finance
Universal Service Administrative Company
2000 L Street, NW, Suite 200
Washington, DC 20036



Dennis C. Brown